

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE PROVISION OF OPERATOR SERVICES)
BY AMERICALL SYSTEMS OF LOUISVILLE) CASE NO. 89-132

O R D E R

INTRODUCTION

On January 8, 1990, the Commission entered an Order in this case finding, in part, that AmeriCall Systems of Louisville ("AmeriCall") should cease providing intraLATA¹ telecommunications services, including but not limited to operator services, because the Commission has not authorized entities other than local exchange carriers to provide intraLATA operator services and because AmeriCall owns transmission facilities. On January 12, 1990, AmeriCall filed a motion for a stay of enforcement of the Commission's Order. The motion was granted on January 18, 1990. On January 29, 1990, AmeriCall filed an application for rehearing. The application was granted February 20, 1990 for the purpose of allowing the parties to file briefs on the issues. South Central Bell Telephone Company ("South Central Bell") filed a brief on March 22, 1990. AmeriCall filed a brief on March 23, 1990.

¹ Local Access and Transport Area.

DISCUSSION

Operator Services

In its Rehearing Brief, AmeriCall argues that the Order to cease providing intraLATA operator services "is unlawful, unreasonable, or both."²

First, AmeriCall asserts that providing intraLATA operator services is consistent with Commission policy because the Commission's Orders in Administrative Case Nos. 261³ and 273:⁴

[C]learly and unambiguously authorized non-facilities based competition in the intraLATA marketplace; the Commission did not restrict that competition to the marketplace for direct dialed services.⁵

Collectively, the Commission's decisions in Administrative Case Nos. 261 and 273 do permit non-facilities based intraLATA competition -- in the form of WATS⁶ resale. Moreover, the Commission did intend to restrict the scope of intraLATA competition.

In Administrative Case No. 261, the Commission found that the resale of intrastate WATS was in the public interest and approved

² Brief on Rehearing of AmeriCall, filed on March 23, 1990, page 5.

³ Administrative Case No. 261, An Inquiry Into the Resale of Intrastate Wide Area Telecommunications Service.

⁴ Administrative Case No. 273, An Inquiry Into Inter- and IntraLATA Intrastate Competition in Toll and Related Services Markets in Kentucky.

⁵ Brief on Rehearing of AmeriCall, page 5, emphasis deleted.

⁶ Wide Area Telecommunications Services.

the removal of resale restrictions from WATS tariffs. In Administrative Case No. 273, the Commission created a regulatory framework that distinguished between dominant and non-dominant carriers, permitted facilities-based interLATA competition, prohibited facilities-based intraLATA competition, and allowed non-facilities based carriers - i.e., WATS resellers - to resell WATS on a statewide basis.

AmeriCall attempts to shift the axis of debate away from the service-specific focus of Administrative Case No. 261 to a generic focus on method of transmission. For example:

AmeriCall's provision of 0+ services. . . is consistent with the Commission's policy promoting the efficient use of available transmission capacity. AmeriCall's 0+ service does not alter its method of transmission or affect its use of available transmission capacity. In other words, 1+ and 0+ telephone calls are handled in exactly the same manner. . . .⁷

AmeriCall's shift of focus is misplaced and irrelevant. The issue is not the efficient or inefficient use of available transmission capacity, or the method of transmission, but whether AmeriCall is providing intraLATA operator services in violation of Commission policy and whether such provision of service is unreasonable. The entire record of evidence in Administrative Case No. 261 focused on the resale of WATS and only WATS. Moreover, the regulatory framework established in Administrative Case No. 273 did not expand the resale of WATS to other

⁷ Brief on Rehearing of AmeriCall, page 12.

telecommunications services. Therefore, AmeriCall's provision of intraLATA operator services is inconsistent with past Commission decisions.

Second, AmeriCall contends that approval of its operator services tariff was not inadvertent and that the Commission cannot now disapprove it based on inadvertence but that any present disapproval must be based on a finding that the tariff is either unlawful or unreasonable.

AmeriCall is correct and the Commission's Order in this matter dated January 8, 1990 and the Commission's February 20, 1990 Order granting rehearing explicitly found that AmeriCall's provision of intraLATA operator service was unreasonable.

The Commission clearly has the authority to review effective tariffs pursuant to KRS 278.280(1). Croke v. Public Service Commission of Kentucky, 573 S.W.2d 927, 929-930 (Ky. App. 1978), cited by AmeriCall states in pertinent part that:

KRS 278.280 [is] the statute pertaining to situations where existing rules [of a utility] are not appropriate for application to certain circumstances. . . . We have no doubt that the Public Service Commission has the power to make appropriate findings and order change in a rule. . . .

In the January 8, 1990 Order, the Commission found that AmeriCall was providing operator services on an intraLATA basis contrary to Commission policy. The Commission stated it was concerned about AmeriCall's provision of intraLATA operator services when to date it has not allowed any non-local exchange carrier to provide intraLATA operator services. Accordingly, the Commission found by the same Order that it was inappropriate for

AmeriCall to provide intraLATA operator services. These determinations are findings made pursuant to KRS 278.280(1). That is, they are findings of unjust, unreasonable, and improper practices of AmeriCall.

Third, AmeriCall asserts that:

[T]he Commission's disregard of AmeriCall's substantial investment to provide 0+ intraLATA services is both heavy handed, and arbitrary and capricious in violation of the Kentucky Constitution.⁸

Specifically, AmeriCall objects to the following statement from the Order granting rehearing:

AmeriCall is apprised that such further arguments about expenditure of monies by AmeriCall to provide intraLATA operator services carries little weight. The Commission does not perceive the presence or absence of such expenditures as a basis of any Commission decision.⁹

The Commission upholds the above statement and finds that it is neither heavy handed nor arbitrary and capricious. The decision whether AmeriCall should cease providing intraLATA operator services should not hinge on investment by AmeriCall, but on whether such service is reasonable or unreasonable.

AmeriCall argues that the Commission's statement that arguments about expenditure of monies will carry little weight violates Kentucky Constitution Section 2 which states:

Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

⁸ Ibid., page 6.

⁹ Order in this case dated February 20, 1990, page 3.

However, for reasons detailed in the January 8, 1990 Order at pages 7-10, the Commission found that expenditure of monies to provide intraLATA operator service was irrelevant to its decision concerning the appropriateness of such intraLATA provisioning. The Commission bears no "absolute and arbitrary power" over AmeriCall's property. AmeriCall may own and expend these monies, it simply may not use its expenditures in providing intraLATA operator services, except in compliance with this and previous Orders.

After consideration of all arguments and based on the foregoing discussion, the Commission finds that AmeriCall is providing intraLATA operator services in violation of Commission policy. For the reasons stated herein and in prior Commission Orders, the Commission concludes, as it did in its Order of January 8, 1990, that such provision of service is unreasonable.

However, since January of this year, the Commission has entered decisions in (1) Administrative Case No. 330¹⁰ that allow intraLATA 0+ traffic incidental to the provision of interLATA operator services; and (2) Administrative Case No. 323¹¹ finding prima facie that intraLATA competition is in the public interest.

¹⁰ Administrative Case NO. 330, Policy and Procedures in the Provision of Operator-Assisted Telecommunications Services.

¹¹ Administrative Case No. 323, An Inquiry Into IntraLATA Toll Competition, An Appropriate Compensation Scheme for Completion of IntraLATA Calls by Interexchange Carriers, and WATS Jurisdictionality.

Implementation of the Administrative Case No. 323 decision is sometime away. In the interim, the Commission finds it reasonable to strike a middle ground. First, the Commission will allow AmeriCall to "grandfather" and continue to serve customers under special contract¹² and other operator services customers as of the date of this Order, pending implementation of the prima facie decision in Administrative Case No. 323.

This allowance shall include any special contracts and other operator services accounts, including customers AmeriCall has designated as "O+ only customers" (filed as Confidential Exhibit A, June 21, 1989), all of which may be assigned to AmeriCall by AmeriCall Dial-O Services, Inc. ("Dial-O") as a result of the Commission's decision entered today in Case No. 90-001.¹³ Such special contracts and other operator services accounts shall not be renewed upon their expiration or termination. Second, the Commission will allow AmeriCall to transmit casual use intraLATA O+ traffic that is incidental to its provision of interLATA operator services, consistent with the terms and conditions specified in Administrative Case No. 330. Third, the Commission will require AmeriCall to cease making any representation to any existing or prospective customer that it is authorized to provide

¹² See 807 KAR 5:011, Section 13.

¹³ Case No. 90-001, Investigation of Telecommunications Services by AmeriCall Dial-O Services, Inc.

intraLATA operator services and require AmeriCall to cease any marketing of intraLATA operator services, pending implementation of the prima facie decision in Administrative Case No. 323. Fourth, the Commission will require that AmeriCall not enter into any special contract or otherwise agree to provide intraLATA operator services after the date of this Order, pending implementation of the prima facie decision in Administrative Case No. 323. Fifth, the Commission will require AmeriCall to revise its operator services tariff to obsolete rates and charges and terms and conditions of service related to intraLATA operator service, and limit their applicability to the class of customers discussed above.

Facilities Owned by AmeriCall

In the January 8, 1990 Order, the Commission found that AmeriCall's ownership of transmission facilities was in contradiction with its certificate authorizing the provision of intraLATA telecommunications services through the resale of WATS. As a result, the Commission determined that AmeriCall should be prohibited from providing intraLATA telecommunications services, but could continue to provide interLATA telecommunications services as a facilities-based carrier. The Commission granted rehearing on this issue strictly to allow AmeriCall to propose a plan regarding its facilities that would be consistent with Commission policy. The Commission specified that such a plan should include either divesting its ownership in transmission facilities or disabling these facilities.

In its Rehearing Brief, AmeriCall listed four proposals for divesting itself of the facilities:

(1) Convey the facilities to an entity wholly-owned by AmeriCall;

(2) Convey the facilities to the entities connected by these facilities to AmeriCall's switch, that is, Liberty National Bank and Trust Company ("Liberty Bank"), Qwest, and MCI Telecommunications Corporation ("MCI");

(3) Convey the facilities to another telephone utility; and/or

(4) Convey the facilities to the local exchange carrier.

AmeriCall stressed that any proposal approved by the Commission should not include disablement, because without use of the facilities, AmeriCall and others will be substantially injured. AmeriCall indicated that disablement would require traffic to be rerouted over South Central Bell facilities and contended that South Central Bell currently lacks the capacity to handle all of the traffic in a manner compatible with AmeriCall's present needs.

AmeriCall also indicated it has had discussions with Liberty Bank, MCI, and Qwest and these entities had expressed some interest in acquiring these facilities. However, AmeriCall noted that the Commission's designation of these facilities as ". . . an intraLATA facility, which even facilities-based carriers are not

authorized to use. . ."¹⁴ has complicated these discussions. AmeriCall argued that these facilities are not intraLATA facilities because they do not terminate intraLATA traffic. AmeriCall supported this contention with a footnote that used as an illustration AT&T's multiple points-of-presence within Kentucky LATAs which are connected by intermachine trunks. AmeriCall noted that the Commission has not disallowed these facilities and should not do so because they do not terminate intraLATA traffic.

The issue of whether the classification of transmission facilities should be based on the geographic locations of the end points of the circuits or, in the alternative, the nature of the traffic carried over the circuits is an important one. A determination on the classification of these facilities is crucial to AmeriCall's decision on the appropriate disposition of its transmission facilities. Logical consistency with existing policies allows for only one conclusion. However, it should be noted that Administrative Case No. 323 may require reconsideration of this issue. At the present time, the Commission can only conclude that transmission facilities should be classified based on the nature of the traffic carried over the circuits, as this conclusion is the only one consistent with the Commission's often-stated policy that telecommunications services are deemed to be jurisdictional if a particular service offering originates and

¹⁴ Order in this case dated January 8, 1990, page 10.

terminates in Kentucky, irrespective of the physical routing of the circuits used to provide the service.

The nature of telecommunications networks is such that traffic can literally be routed to outer space and back, and intrastate traffic is routinely routed over physically "interstate" circuits. The converse is also generally true -- jurisdictionally interstate calls may be transported primarily through circuits that have intrastate circuit terminations which are chained together to form the entire circuit needed to complete the call. In most instances, it is not possible to determine in advance how a particular call will be routed, as telecommunications networks are properly designed to be flexible in the event of circuit failures and traffic congestion. Furthermore, AmeriCall's point is well taken that a definition based on geographic locations of circuit terminations would imply that multiple points-of-presence within LATAs by interLATA carriers is currently prohibited, which it is not. Therefore, AmeriCall is correct that the Commission erred in referring to these facilities as "intraLATA facilities" in the absence of evidence that these circuits are actually being used to complete intraLATA services. To the extent that these circuits are used to complete interLATA or interstate traffic only, their ownership by carriers authorized to operate transmission facilities is not in violation of existing policies. This does not alter the Commission's determination that AmeriCall's ownership of transmission facilities was in contradiction with its certificate

authorizing it to provide intraLATA telecommunications services through the resale of WATS.

In its Rehearing Brief, AmeriCall again raised its objections to the lack of prior notice that its facilities would be an issue at the hearing. This issue was addressed in the Commission's February 20, 1990 Order and need not be addressed herein; however, AmeriCall further contends that it has been deprived of the opportunity to conduct discovery of the local exchange carrier in order to demonstrate that the facilities were not duplicative and to present evidence at the hearing that the facilities were not of the kind prohibited to resale carriers. AmeriCall argues that the Commission's prohibition against ownership of facilities by those engaged in intraLATA competition extends only to intraLATA transmission facilities which result in wasteful duplication.¹⁵

AmeriCall's arguments imply that AmeriCall either believes the Commission's existing policy is to permit facilities-based carriers to compete directly in the intraLATA market through the resale of WATS or that AmeriCall's facilities are actually intraLATA facilities despite its arguments that they are not.

In response, the Commission notes that whether or not the facilities are duplicative of the local exchange carrier's facilities is irrelevant to the Commission's determination that ownership of these facilities is in contradiction with AmeriCall's certificated authority. The Commission made no distinctions with

¹⁵ Brief on Rehearing of AmeriCall, pages 6-7.

respect to "type of facilities" in Administrative Case Nos. 261 and 273. In Administrative Case No. 261, the Commission allowed a very limited form of intraLATA competition by resellers of WATS while at the same time declining to permit even the resale of private line services. There is not even the slightest allusion to any "type of facilities" that WATS resellers would be permitted to own.

At the time, it was not even contemplated that WATS resellers would resell any services other than WATS, much less that a WATS reseller would construct facilities if it unilaterally determined that these facilities would not be duplicative and that public convenience and necessity required the construction. The Commission notes that AmeriCall did not even seek required Commission approval prior to construction of the facilities in question. In Administrative Case No. 273, the Commission examined the issues of intraLATA and interLATA toll competition by facilities-based carriers, and ultimately authorized only interLATA toll competition by facilities-based carriers, again without the slightest allusion that these carriers would also be permitted to provide intraLATA services through the resale of WATS. AmeriCall cannot be under the misconception that intraLATA resale by facilities-based carriers is currently permitted, as its position in Administrative Case No. 323 is that the Commission's

policies ". . . can be expanded upon to allow facilities-based carriers to participate in the intraLATA market on a retail basis."¹⁶

In summary, AmeriCall's contentions that it has been deprived of the opportunity to conduct discovery of the local exchange carrier in order to demonstrate that the facilities were not duplicative are without merit as such evidence would only have relevance in an application to construct local or intraLATA facilities. AmeriCall's contentions that it has been deprived of the opportunity to present evidence that the facilities were not of the type prohibited to resale carriers are also without merit, as the Commission does not permit resale carriers to directly own any type of transport facilities. The ownership of interLATA transmission facilities is clearly the province of the interLATA facilities-based carriers, which are not permitted to also participate in the intraLATA market on a retail basis.

Therefore, the Commission finds that AmeriCall's request to vacate its determinations with respect to its facilities should be denied. As indicated in the January 8, 1990 Order, if AmeriCall elects to retain its facilities, it should be prohibited from providing intraLATA telecommunications services but should be permitted to provide interLATA telecommunications services as a facilities-based carrier and modify its tariff accordingly. If AmeriCall wishes to retain its status as a WATS reseller, it has

¹⁶ Administrative Case No. 323, Brief of AmeriCall Systems of Louisville, filed March 1, 1990, page 5.

the option of either divesting its ownership in transmission facilities or disabling these facilities, as indicated in the Commission's February 20, 1990 Order. The Commission further finds that the four proposals for divesting itself of its facilities are acceptable; however, it should be noted that if AmeriCall conveys the facilities to an entity that has not been previously authorized to operate as a utility, such as Liberty Bank or Qwest, the entity must seek Commission authority prior to providing utility services. Accordingly, AmeriCall shall notify the Commission of its plans to retain ownership or divest itself of the facilities within 20 days from the date of this Order.

Other Matters

In addition to the issues already discussed, the Commission's Order of January 8, 1990 required AmeriCall to cease from providing transmission services to other carriers without approved tariffs.¹⁷ AmeriCall's Rehearing Brief does not address this issue.

The Commission finds that its decision must be upheld. No carrier, including AmeriCall, should be allowed to provide transmission services to another entity that is a public utility within the meaning of KRS 278.010(2), unless that entity has approved tariffs on file with the Commission. This decision notwithstanding; AmeriCall may provide transmission services to Dial-O, so long as such service is consistent with the terms and

¹⁷ Order in this case, dated January 8, 1990, page 13.

conditions of this Order and the Commission's May 25, 1990 decision in Case No. 90-001.

ORDERS

IT IS HEREBY ORDERED that:

1. Within 30 days from the date of this Order, AmeriCall shall cease providing intraLATA operator services, except as specified in this Order and as incidental to its provision of interLATA operator services under the terms and conditions specified in Administrative Case No. 330, pending implementation of the prima facie decision in Administrative Case No. 323.

2. AmeriCall may grandfather customers under special contract and other operator services customers as of the date of this Order, including any special contracts and other operator services accounts assigned to AmeriCall by Dial-O as a result of the Commission's decision entered May 25, 1990 in Case No. 90-001, pending implementation of the prima facie decision in Administrative Case No. 323. Such special contracts and other operator services accounts shall not be renewed upon their expiration or termination.

3. AmeriCall shall cease making any representation to any existing or prospective customer that it is authorized to provide intraLATA operator services and shall cease marketing of intraLATA operator services, pending implementation of the prima facie decision in Administrative Case No. 323.

4. AmeriCall shall not enter into any special contract or otherwise agree to provide intraLATA operator services with any

new customer after the date of this Order, pending implementation of the prima facie decision in Administrative Case No. 323.

5. Within 30 days from the date of this Order, AmeriCall shall revise its operator services tariff to obsolete rates and charges and terms and conditions of service related to intraLATA operator services, and limit their applicability to the class of customers specified in this Order.

6. AmeriCall's request that the Commission vacate its determinations with respect to its facilities is denied and AmeriCall shall notify the Commission of its plans to retain ownership or divest itself of the facilities within 20 days from the date of this Order.

7. AmeriCall shall not provide transmission services to any entity that is a public utility within the meaning of KRS 278.010(2), unless that entity has approved tariffs on file with the Commission.

8. AmeriCall may provide transmission services to Dial-0 consistent with the terms and conditions of this Order and the Commission's May 25, 1990 decision in Case No. 90-001.

Done at Frankfort, Kentucky, this 25th day of May, 1990.

ATTEST:


Executive Director

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman

Commissioner